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IN THE

Supreme Court of the United States

October Term, 1996

THE LIBERTARIAN PARTY OF FLORIDA, THE LIBERTARIAN PARTY OF FLORIDA EXECUTIVE COMMITTEE, and ROBERT WILSON,

Petitioners,

v.

JIM SMITH, in his official capacity as Secretary of State, and DOROTHY JOYCE, in her official capacity as Director of the Division of Elections,

Respondents'.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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18 pp

QUESTION PRESENTED

(Restated)

Whether §99.103, Florida Statutes, reasonably discourages factionalism in the election process by rebating part of the filing fees paid by major, but not minor, political party candidates.

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OPINIONS BELOW

Petitioners have correctly identified the opinions below.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1257(a). The judgment under review was rendered by the Florida Supreme Court on December 5, 1996. That court denied rehearing on February 17, 1997. The petition for a writ of certiorari was filed on May 16, 1997; and docketed on May 27.

STATEMENT OF THE CASE

Respondents accept Petitioners' statement of the case.

ARGUMENT

Section 99.103(1), Florida Statutes, provides that a portion of candidate filing fees, after collection, must be rebated to the executive committees of major—but not minor[1]—political parties. As the Party strongly urges, §99.103 is not a ballot *access* statute. Rather, the statute is a post-ballot measure reasonably designed to discourage factionalism through modest financial support of major parties only.

The Florida Supreme Court correctly recognized the challenged statute was not a ballot access provision, so that it was subject to lesser scrutiny than a statute imposing conditions for qualifying. *See Libertarian Party v. Smith,* 687 So.2d 1292, 1294 (Fla. 1996). (Pet. App. 2–3) In so doing, that court provided two strong reasons for this Court to decline review.

First, §99.103 simply does not play a major role in the array of statutes regulating Florida's election process. It does not establish conditions for forming a political party, qualifications for nomination of a candidate, or requirements for campaign finance and reporting. Second, and as explained below, the Florida Supreme Court properly applied precedent of this Court: *Anderson v. Celebreeze,* 460 U.S. 780 (1983), and *Burdick v. Takushi,* 504 U.S. 428 (1992). *See Libertarian Party,* 687 So.2d at 1294 (adopting rationale of lower court) (Pet. App. 3).

Nothing in the decisions announced by *any* court limits a State to preventing factionalism through ballot access measures only. Moreover, numerous federal and state decisions have held that discouraging factionalism is a rational basis for ballot access statutes, which raise far more serious First Amendment concerns. If discouraging factionalism is suffi-

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1 A minor party is defined under §97.021 (12), Florida Statutes (1995), to be a "group...[which] does not have registered as members 5 percent of the total registered electors of the state."

cient to sustain a law affecting a candidate's ability to get on the ballot, then it must also be sufficient to sustain a far more peripheral law as to rebate of filing fees.

The Florida Supreme Court properly rejected the Party's challenge to §99.103. The opinion of that court is correct and does not conflict with any decision of this Court. The Party does not contend the opinion conflicts with any decision of a federal court of appeals, or the supreme court of any state. Further review is not warranted. *See* Rule 10, Rules of the Supreme Court.

I. SECTION 99.103, FLORIDA STATUTES, REASONABLY DISCOURAGES FACTIONALISM IN THE ELECTION PROCESS BY REBATING PART OF THE FILING FEES PAID BY MAJOR, BUT NOT MINOR, PARTY CANDIDATES.

A. The Florida Supreme Court's Decision Was Correct

From the outset of this litigation in the state trial court, Respondents (the "Party") have failed to grasp that §99.103 is an appropriations law reasonably designed to discourage factionalism. It is a codified exercise of the Florida Legislature's appropriations power. In essence, the statute directs that State revenue—already collected through filing fees—be appropriated to specific uses. Part of such revenue goes to the Election Campaign Trust Fund; part to the General Revenue Fund; and part to rebates.[2]

Obviously, the Legislature has exercised its appropriations power in a manner that distinguishes between candidates of major and minor parties. Only the former can obtain re-

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2 Under §99.092(1), Fla. Stat., a qualifying fee has three components: a filing fee, an election assessment, and a party assessment when applicable. The filing fee component represents 4.5% of the salary of the office sought. Initially, the state retains one-third of the filing fee paid by any candidate, and transfers that amount to the Election Campaign Trust Fund. The remainder is distributed pursuant to §99.103.

bates.[3] Nevertheless, the matter at issue here is the allocation of revenue to specific uses—a power residing solely with the Legislature. *State v. Fla. Police Benevolent Assoc.*, 613 So.2d 415, 418 (Fla. 1992) ("Under the Florida Constitution, *exclusive* control over public funds rest (sic) solely with the legislature. [e.s.]").

Because it involves only the allocation of revenue, §99.103 must be reviewed under the least strict standard available when election-related laws are challenged. Ultimately, this test will be the "modified strict scrutiny" test announced in *Anderson v. Celebreeze*, 460 U.S. 780 (1983) and refined in later cases. *See Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992) (noting that the *Anderson* test, rather than strict scrutiny, applies to a ballot-access case).

Over the past two decades, this Court has decided roughly a dozen cases involving equal protection challenges to ballot access and filing fee statutes.[4] In 1983, it departed from

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3 Under §99.061(1), Fla. Stat., a minor party candidate who fails to get sufficient signatures is refunded the entire qualifying fee, including the filing fee.

4 *Williams v. Rhodes*, 393 U.S. 23 (1968) (invalidating Ohio ballot access requirements); *Jenness v. Fortson*, 403 U.S. 431 (1971) (upholding Georgia ballot access requirements); *Bullock v. Carter*, 405 U.S. 134 (1972) (invalidating Texas filing fee requirements); *Storer v. Brown*, 415 U.S. 724 (1974) (upholding certain California ballot access requirements and remanding others); *American Party v. White*, 415 U.S. 767 (1974) (upholding Texas ballot access requirements); *Lubin v. Panish*, 415 U.S. 709 (1974) (invalidating California filing fee requirements); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (invalidating Illinois signature requirements); *Anderson v. Celebreeze, supra* (invalidating Ohio signature requirements); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (upholding Washington ballot access requirements); *Tashjian v. Republican Party of Conn.*, 479 U.S. 209 (1986) (invalidating Connecticut ballot access requirements); *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214 (1989) (invalidating California ban on primary endorsements); *Norman v. Reed*, 502 U.S. 279 (1992) (invalidating certain Illinois signature requirements and upholding others); *Burdick v. Takushi*, 504 U.S. 428 (1992) (upholding Hawaii ballot access requirements).

traditional strict scrutiny in favor of a more flexible balancing approach:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789 (1983). *See Burdick*, 112 S.Ct. at 2063 (the appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in *Anderson); Tashjian*, 479 U.S. at 213 (courts must identify legitimacy of interests advanced by state and consider the extent to which they necessitate burdening voter rights; *citing Anderson). See Munro*, 479 U.S. at 196–99 (upholding Washington statute requiring minor party candidates to receive at least 1% of vote in primary to be placed on ballot in general election).

Later, this Court continued to apply the *Anderson* test, but reconciled that test with traditional strict scrutiny requirements:

> [T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest...would tie the hands of States seeking to assure that elections are operated equitably and efficiently.

* * *

> [A] more flexible standard applies. A court considering a challenge to a state election law must [apply the *Anderson* test]. Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.

Burdick, 112 S.Ct. at 2063 (citations omitted). As a result, this Court's approach to either a First Amendment or Equal Protection challenge to a ballot access limitation depends upon its view of the seriousness of the alleged constitutional infringement.

Applying the pronouncements of *Anderson* and *Burdick*, the Florida Supreme Court correctly subjected §99.103 to scrutiny that was no more rigorous than the "rational basis" test typically applied to economic regulation. *See Fulani*, 973 F.2d at 1543 ("The approach used by the *Anderson* Court can be described as a balancing test that ranges from strict scrutiny to a *rational-basis* analysis, depending on the circumstances." [e.s.]). That court accurately described such scrutiny as a "sliding scale of constitutional review." *Libertarian Party*, 687 So.2d at 1294.

At no time below did the Party attack Florida's ability to impose a filing fee. Similarly, the Party never attacked the amount of the fee. Thus, only the use of money, collected in the form of filing fees, is at issue. *See Little v. Florida Dept. of State*, 19 F.3d 4, 5 (11th Cir. 1994) ("Once the existence and amount of the fee is found to pass constitutional muster, as set forth above, this appropriation is the only matter that remains for objection."). The Florida Legislature has chosen to use already-collected revenue for rebates to major political parties, but not minor ones. The issue is simply whether §99.103 creates an unreasonable classification. That issue

does not invoke strict scrutiny. To the contrary, the statute's First Amendment implications are so minimal that a rational basis test applies.

Preliminarily, a minor party candidate can avoid paying a filing fee pursuant to the "undue burden" provision of §99.096, Florida Statutes.[5] The ability to avoid the fee weighs heavily in favor of the constitutionality of §99.103. *See Lubin v. Panish*, 415 U.S. 709, 717–19, (1974) (absence of alternative to qualifying fee rendered California election system exclusionary as to candidates unable to pay); *Little*, 19 F.3d at 5 (upholding Florida election law for judicial candidates, and noting that the law provided an alternative to filing fee).

In *Little*, a statute providing for judicial qualifying fees was challenged. The plaintiffs contended that the fee violated equal protection because the "allocation" (*id.* at 5) of that fee was different for judicial and non-judicial candidates; and that the "chosen appropriation" (*id.*) violated the First Amendment. Relying solely on *Buckley*, the *Little* court recognized the challengers simply disagreed with the Legislature's use of judicial qualifying fees. The court said:

> The situation here is virtually identical to *Buckley*. Money in the form of filing fees is deposited into general revenue for use therein and in the campaign trust fund. Once the *existence and amount* of the fee is found to pass constitutional muster, as set forth above, this appropriation is the only matter that re-

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5 §99.096(5) provides:

> Any candidate who is unable to pay such fee without imposing an undue burden on his or her personal resources or upon resources otherwise available to him or her shall, upon written certification of such inability given under oath to the Department of State or appropriate supervisor of elections, be exempt from paying the qualifying fee.

mains for objection. The above makes clear that such objection will not be heard. [e.s.]

Id. 19 F.3d at 5. Here, the Party does not challenge the existence or amount of the filing fee. They challenge only the Legislature's allocation of the fees collected.

The *Buckley* decision is critical to Respondents' argument. In that decision, the Court addressed the constitutionality of a campaign finance act limiting political contributions and providing an election campaign checkoff on federal tax returns. The Court concluded that despite the contribution limitation's tendency to discourage the First Amendment guarantees of freedom of expression and association, the government's interest in preventing either corruption or the appearance of corruption was sufficiently important to sustain the limitation. *Buckley,* 424 U.S. at 28-9.

The Court also rejected the argument that equal protection required Congress to permit taxpayers to designate particular candidates or parties as recipients of their money:

> The appropriation...is like any other appropriation from the general revenue except that its amount is determined by reference to the aggregate of the one- and two-dollar authorization on taxpayers' income tax returns. This detail does not constitute the appropriation any less an appropriation by Congress. The fallacy of Petitioners' argument is therefore apparent; every appropriation made by Congress uses public money in a manner to which some taxpayers object.
>
> * * *
>
> Congress need not provide a mechanism for allowing taxpayers to designate the means in which their particular tax dollars are spent.

Id.; 424 U.S. at 91–92 & n. 125.

Other provisions regarding federal subsidies and limitations on campaign contributions and expenditures were also upheld. Significantly, the court found that public campaign financing did not "prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice." 424 U.S. at 94.

A close look at the public campaign financing law (subtitle H of the 1974 Internal Revenue Code) at issue in *Buckley* goes far to sustain the statute challenged here. Subtitle H provided that tax checkoff revenue could be given to candidates and parties for financing party nominating conventions, and campaigns for primary and general elections. The monetary amounts available were specified, as were other conditions for voluntary participation in public financing. *Id.*, 424 U.S. at 85–90.

Subtitle H also established criteria for receipt of public money according to party size. Parties were classified as "major", "minor," or "new." Major parties were those whose most recent candidate for President received at least 25% of the vote. Minor parties were those whose candidates received less than 25%, but at least 5% of the vote. All other parties were considered to be new. *Id.*, 424 U.S. at 87–8. Only major and minor parties received public money for presidential nominating convention expenses. New parties received nothing. *Id.*

For the presidential campaigns themselves, the major party candidates received $20 million before the general election. Minor party candidates received, also before the election, a lesser amount based on votes received in the last election in relation to the votes received by the major parties. New party candidates could not receive any money until after the general election. Then, their share was computed under the same method as for minor parties— *if* they received at least 5% of the vote in the general election. *Id.*, 424 U.S. at 88–9.

In short, new party candidates were denied any pre-election public funding. If they did not get at least 5% of the popular vote, they did not get any public money. Here, the Florida Legislature has denied pre-election public funding (i.e., rebates of revenue generated through filing fees) to political parties that do not have at least 5% of the registered voters. If Congress can deny public money to "new" parties receiving less than 5% of the vote in an earlier election, then the Florida Legislature can deny partial filing fee rebates to parties which include less than 5% of the registered voters.

The Party does not attack the 5% amount as unreasonable. It does not attack the Florida Legislature's decision to base rebate eligibility on a party's pre-election size rather than votes actually cast for that party in an earlier election. It concedes that the Legislature could retain all filing fees, thereby denying rebates to all parties.

All that remains is to show a rational basis for §99.103. As that statute declares, its purpose is to assist the state executive committees of the major parties meet their "expenses." §99.103(1). By rebating fees to those committees, the Legislature financially encourages or strengthens major, non-factional parties. It thereby discourages proliferation of splinter parties; which must know, before an election, that they will not be eligible for rebates.

Such considerations were sufficient to justify certain ballot access provisions in California. *See Storer v. Brown*, 415 U.S. 724 (1974) ("California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government."). If discouraging factionalism is sufficient to sustain a law affecting a candidate's ability to get onto the ballot, then it must also be sufficient to sustain a far more peripheral law as to rebate of filing fees. Similarly, if the State can favor major parties in a manner restricting ballot access by splinter groups, the State certainly can favor major parties when

allocating modest amounts of public funds to which no political party is constitutionally entitled.

Applying a rational basis test, §99.103 can reasonably be said to strengthen major parties and thereby discourage factionalism through modest financial support of the executive committees of major political parties. Any First Amendment implications are overcome, particularly since a minor party candidate can avoid the filing fee when that fee would unduly burden a party's resources otherwise available to the candidate.

The Party's railings against §99.103 are essentially no different from the arguments that were unsuccessful in *Buckley*. The Party too must fail; the Florida Supreme Court correctly decided this case.

B. Political Parties and Candidates Have No Independent Constitutional Right to "Financially Develop and Compete"

The Party next contends the challenged statute harms its right to "financially develop and compete." There are two barriers to reaching this issue, neither of which the Party can overcome.

First, there has never been any evidence which would support the Party's claim of harm. This case proceeded on narrow facts stipulated to by the parties. These facts are accurately described in the Party's statement of the case. (Pet., p. 5) By no stretch of the imagination would they support the Party's speculation that its competitiveness was abridged by §99.103.

This court must not accede to such speculation. *See Buckley v. Valeo*, 424 U.S. 1, 70 (1976) (agreeing that alleged infringement of First Amendment rights through compelled disclosure of contributors was "highly speculative"); *Id.*, 424 U.S.

at 93, n. 126 (claim that public funding of presidential campaigns would lead to government control of political parties' internal affairs "wholly speculative"); and *Id.*, 424 U.S. at 99 & n. 134 (rejecting claim that one aspect of election funding law disadvantaged non-major parties, in part because "whatever merit the point may have...is questionable on the basis of the record before the Court").

Second, the Party does not, and cannot, point to an independent constitutional right to "financially develop and compete." Absent violation of other constitutional rights asserted by the Party, there can be no cognizable harm. Whatever interest the Party has in being financially competitive, that interest is not of constitutional status. It provides no basis for certiorari review.

C. Section 99.103, Florida Statutes, Does Not Impose an Unconstitutional Condition on the Party's Associative Rights

The Party's third point must fail for much the same reason as its second point. There are no facts in the record which would show §99.103 impaired the Party's associational rights. To the contrary, the stipulated facts show that the Party (already formed) timely nominated its chosen candidate, who paid a filing fee. It was never alleged that the candidate (Wilson) was reluctant to run as the Party's candidate, much less that he was reluctant run because his filing fee would not be partially rebated to the Party's executive committee.

Equally important, the challenged statute, on its face, does not impose any condition on the Party's associational rights. As said earlier, §99.103 is an appropriations measure only. It does not establish requirements for the formation of a party or nomination of candidates. It does not impose conditions or deadlines for appearing on the ballot. It does not impose a filing fee. Rather it simply states how already-collected filing fees will be disbursed.

Whether another statute, under different facts, could impose an unconstitutional condition on a political party's associative rights is a question that must wait another day. The Party's third point does not present any ground for certiorari review.

II. THE CONSTITUTIONALITY OF §99.103, FLORIDA STATUTES, DOES NOT PRESENT A QUESTION OF IMPORTANCE

In a single paragraph, the Party claims "campaign finance reform" is a "matter of intense legal and public policy concern." Perhaps true in the abstract, this statement has nothing to do with this case, which involves a minor statute specifying how political candidates' filing fees are disbursed after collection.

There is no factual or legal basis for the Party's claim that this case involves campaign finance reform. Given the facts and statute at issue, this case is not sufficiently important for this Court to review the correctly-reasoned decision of the Florida Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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